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## THE REGULATION OF BROKERS— NEW DEVELOPMENTS

*Christine Godsil Cooper\**

*The real estate broker's duty to protect his client's interests often requires conduct which is incompatible with the broker's own interests. Because of the wide latitude presently given realtors in completing contracts of purchase and sale, there exists a great temptation for brokers to engage in self-serving practices. The public needs protection from the broker who acts adversely to an employer's interests. The Real Estate Brokers and Salesmen License Act of 1973 was enacted to police the activities of realtors through licensing, revocation, and suspension procedures. Since the Act's passage, Illinois courts have been concerned with articulating the scope of the broker's duty to the public. In this Article, Ms. Cooper examines these decisions and discusses the recent judicial attention given to problems which emerge when a broker performs legal functions.*

Since the landmark decision in *Chicago Bar Association v. Quinlan & Tyson*,<sup>1</sup> the bench, the bar, and the real estate industry have been concerned with the respective roles of lawyers and brokers.<sup>2</sup> As a result of this

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1. 34 Ill. 2d 116, 214 N.E.2d 771 (1966) [hereinafter cited as *Quinlan & Tyson*].

2. While there is a technical distinction between the term "broker" and the term "real estate salesman," the terms are used interchangeably throughout, unless otherwise indicated. In general, the broker has met higher certification standards than has the salesman, and the broker has more experience. The Illinois Real Estate Brokers and Salesmen License Act, ILL. REV. STAT. ch. 111, §§ 5701-5743 (1977) defines a "broker" as:

[A]ny person, association, copartnership or corporation, who for compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases, or offers to lease, or rents or offers for rent, any real estate, or negotiates leases thereof, or of the improvements thereon for another or others, or who performs any of the foregoing acts for his own account while engaged in the business of buying or selling real estate.

*Id.* at § 5706(a). A "salesman" is:

[A]ny person who for compensation or valuable consideration is employed either directly or indirectly by a real estate broker or by such attorney-in-fact as is exempted in this Section from the provisions of this Act or by any one person, copartnership, or corporation regularly engaged in the business on his or its own account, and not as a broker or agent for others, of buying, selling, or leasing real estate, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale of exchange of real estate, or to lease or offer for lease, to rent or offer for rent, any real estate, or to negotiate the leases thereof or of the improvements thereon.

*Id.* at § 5707(a). The qualifications for a broker or salesman applicant are set forth in § 5726.

decision<sup>3</sup> brokers have been restricted in their conduct.<sup>4</sup> To conform to and clarify this decision, the bar and the real estate industry adopted the Illinois Real Estate Broker-Lawyer Accord,<sup>5</sup> which is an attempt to delineate the proper activities of lawyers and brokers in general, and in particular to prevent the unauthorized practice of law by brokers.<sup>6</sup> The decision, while prohibiting brokers from giving legal advice and drafting or completing most legal documents, does allow the broker to fill in the blanks of standard form contracts of purchase and sale. Whenever a broker oversteps the guidelines set up by *Quinlan & Tyson* and the Accord, the broker then subjects himself to either a cause of action for the unauthorized practice of law<sup>7</sup> or to an adverse opinion from the Illinois Joint Real Estate Broker-Lawyer Committee. The Accord, however, does not provide any authority for the Committee to enforce its decisions with sanctions.<sup>8</sup>

3. For a summary of the law in this area, see Cohen, *South Suburban Bar Association v. Homestead Realty—An Extension or Merely an Application of Chicago Bar Association v. Quinlan & Tyson?*, 60 CHI. B. REC. 6, 9-12 (1978).

4. See Note, *Conveyancing—The Roles of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions—Wherein Lies the Public Interest?* 19 DEPAUL L. REV. 319, 320-22 (1969) [hereinafter cited as *Note*].

The Illinois Supreme Court held that brokers were authorized to prepare conveyancing documents only where: 1) the broker executes "an offer or preliminary contract" which evidences the broker's "service in bringing together the buyer and seller"; and 2) "where this involves merely the filling in of blank forms," involving "merely the supplying of simple factual data." 34 Ill. 2d at 121, 214 N.E.2d at 774.

5. The Illinois Real Estate Broker-Lawyer Accord was approved and adopted on October 26, 1966, by the Illinois Association of Real Estate Boards, the Illinois State Bar Association, the Chicago Bar Association, and the Chicago Real Estate Board. It is reproduced in *Note, supra* note 4, at 344.

The Accord was drafted by a joint committee of lawyers and real estate brokers. The purpose of the Accord was to clarify the *Quinlan & Tyson* decision; define the respective roles of lawyers and brokers in the conveyancing process; and to establish a committee composed of brokers and lawyers to settle future disputes. See *id.* at 338-39.

In 1974, a committee of the Illinois House of Representatives met to study the Illinois Real Estate Broker-Lawyer Accord. That committee specifically found that the Accord was working well enough to obviate the necessity for passing legislation to implement the *Quinlan & Tyson* decision. HOUSE COMMITTEE TO STUDY THE ILLINOIS REAL ESTATE BROKER-LAWYER ACCORD, 79th GEN. ASSEMBLY, REPORT 7-8 (1974).

The subsequent history of the Accord and the Real Estate Broker-Lawyer Joint Committee is discussed in Spelman, *Eight Years of "The Accord", or All so Sunshine and Light in the Land of the Broker/Lawyer*, 64 ILL. B.J. 42 (1975).

6. Of course, the majority opinion in *Quinlan & Tyson* held that the completion of the contract of sale by the broker does not constitute the unauthorized practice of law. However, as will be developed, I hold with the dissent of Justice Underwood in which he stated that "[a]ctually, the contract between the parties is the fundamental instrument in a real-estate transaction and determines their future rights and obligations. It seems to me somewhat anomalous to permit the broker to prepare the controlling agreement but not those which it controls." *Id.* at 124, 214 N.E.2d at 776.

7. See *Note, supra* note 4, at 335-36, 335 n.83, and text accompanying notes 126, 127 *infra*.

8. See *Note, supra* note 4, at 346-47.

The public needs protection from harms other than the unauthorized and often self-serving practice of law by brokers. The remaining major source policing the activities of real estate brokers is the Real Estate Brokers and Salesmen License Act of 1973.<sup>9</sup> That statute, enacted to protect the public interest by evaluating the competency of persons engaged in the real estate business, requires the licensing of realtors.<sup>10</sup> It also provides for the suspension or revocation of licenses for specific enumerated conduct<sup>11</sup> as well as for generally demonstrating "unworthiness or incompetency" to perform as a real estate broker or salesman<sup>12</sup> or for "dishonest dealing."<sup>13</sup> An individual who suffers damage as a result of the activity of a real estate broker or salesman may have recourse to the Real Estate Recovery Fund.<sup>14</sup> Licensed realtors are statutorily required to pay a fee into this fund for the protection of the public.

Throughout the preceding year<sup>15</sup> the Illinois courts have dealt with several cases concerning the conduct of real estate brokers and salesmen and have made numerous interpretations of the Real Estate Brokers and Salesmen License Act. The Illinois courts have involved themselves with the important and enduring issue of the duty of the real estate broker to the public. This Article will examine those decisions and analyze their effect on the broker-lawyer relationship.

#### THE ROLE OF THE REALTOR

Before examining the duties of the real estate broker or salesman, it will be useful to consider the role of the realtor in the ordinary residential real estate transaction.<sup>16</sup> When a person decides to sell his or her property, he or she is faced with a choice: either sell the property through his or her own efforts or enlist the aid of a broker. If a broker is chosen, the homeowner and broker enter into a listing agreement which is usually a standard form

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9. ILL. REV. STAT. ch. 111, §§ 5701-5743 (1977).

10. *Id.* at § 5701.

11. *Id.* at §§ 5701 & 5732.

12. *Id.* at § 5732(e)(11). The conduct giving rise to suspension or revocation need not be directly related to the real estate profession. See note 84 and accompanying text *infra*.

13. ILL. REV. STAT. ch. 111, § 5732(e)(15) (1977).

14. Payment from the fund is made by order of the circuit or district court of the county wherein the violation occurred. The aggrieved individual may recover only for the loss of actual cash money and not for losses in market value. The maximum recoverable is \$10,000 for damages plus up to 15% of the damage award for attorneys' fees and costs of suit incurred in connection therewith. *Id.* at § 5716. Other states have similar Recovery Funds. A discussion of the California Real Estate Recovery Fund, which predates the Illinois Fund, is found in Duty, *Real Estate Licensee Recovery Fund, the California Experience*, 7 BEVERLY HILLS B.J. 13 (May-June 1973).

15. Cases decided from December, 1977, to the present have been considered herein.

16. The role of the realtor vis-à-vis the role of the attorney in the residential real estate transaction is significant because it is usual in residential transactions that at least one of the parties will forego the expense of an attorney. As will be shown, this attempt to bypass the bar is not in the best interests of the parties.

contract prepared by attorneys for the local real estate board. The most common type of listing agreement is an exclusive right to sell which is tied into a multiple listing service.<sup>17</sup> When a multiple listing service is used, the broker who has obtained the listing, the listing broker, will receive a commission if and when anyone sells the property during the term of that list.<sup>18</sup> If the listing broker sells the property himself, he will receive the entire commission.<sup>19</sup> If, however, a cooperating broker under the Multiple Listing Service brings buyer and seller together, then the listing broker must split the commission with the selling broker—usually on a fifty-fifty basis.<sup>20</sup>

The importance of the listing agreement cannot be underestimated. Because it is a contract, it defines the legal obligations of both the seller and the broker. It sets forth the obligation of the owner to pay a broker's commission—usually a percentage of the purchase price—when the listing broker or any cooperating broker presents a buyer who is ready, willing, and able<sup>21</sup> to purchase the property upon the same terms as are contained in the

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17. This is surely true in the Chicago Metropolitan area with respect to the residential market. Indeed, few realtors will consider an open listing since the broker then faces the prospect of expending time and money in securing a buyer, only to be denied a commission by a sale made by the owner or another broker.

18. There are three types of listings: (1) an open listing, according to which a particular broker earns the commission only if that broker is the procuring cause of the sale; (2) an exclusive agency, where the owner is barred from appointing any other agency, but the owner is allowed to sell the property without incurring liability for the commission; and (3) an exclusive right to sell, according to which the broker is entitled to the commission regardless of who procures the sale, the owner or another broker.

In *Bau v. Sobut*, 50 Ill. App. 3d 732, 365 N.E.2d 724 (1st Dist. 1977), the broker was denied a commission because the alleged oral contract entered into by broker and seller was too indefinite. The court found that necessary terms such as the legal description of the property to be sold, length of time for the exclusive listing, amount of commission and the specific description of the prospective purchaser were all missing. Thus, the court implied that the contract was merely an open listing. Since it was the owner who procured the sale there was no liability for the broker's commission.

In *Brown v. Miller*, 45 Ill. App. 3d 970, 360 N.E.2d 585 (1st Dist. 1977), the court found an exclusive contract to sell which entitled the broker to a commission even if the owner procured the sale without the broker's assistance. Although the defendant contended he had signed only an exclusive agency contract, the specific language of the agreement obligated the owner to pay the broker even if the property was sold to a stranger unknown to the broker.

19. In the Chicago metropolitan area, brokers' commissions range from five to seven percent. *See, e.g., Brown v. Miller*, 45 Ill. App. 3d 970, 360 N.E.2d 585 (1st Dist. 1977) (six percent commission agreement).

20. *Id. See, e.g., ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, REAL ESTATE LITIGATION* § 6.13 (1975) [hereinafter cited as *REAL ESTATE LITIGATION*].

21. In *Ellis Realty v. Chapelski*, 28 Ill. App. 3d 1008, 329 N.E.2d 370 (1st Dist. 1975), the court granted the broker a commission because the oral agreement specified a sale price and the commission to be taken from that price. The defendant claimed he was never legal owner of the property since he was only the beneficial title holder in a land trust. The court held that consummation of the sale is not required to entitle the broker to a commission. All the broker must do is present a ready, willing, and able buyer. Therefore it was irrelevant that the principal was not the legal owner—the commission had to be paid.

listing agreement. If the broker presents such a prospective purchaser to the owner and the owner refuses to enter into a contract of sale with the purchaser, then the owner will be liable for the broker's commission.<sup>22</sup>

After the broker finds a potential buyer, his goal is to induce the parties to execute a contract of purchase.<sup>23</sup> The contract of sale, which can be completed by the broker, determines what state of title the buyer agrees to take, what financial arrangements may or must be made, what type of title insurance will be provided and by whom, and numerous other legal rights and obligations. The executed contract is the blueprint for all subsequent events, including the closing documentation. When buyer and seller have signed the contract, there is often little of a non-ministerial nature that the attorney for the buyer or for the seller can do for the client;<sup>24</sup> the obligations of each party have already been determined.

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The prospective purchaser is considered ready and willing if he or she accepts the property on the seller's terms and remains willing to purchase throughout negotiations. *Wolfenberger v. Madison*, 43 Ill. App. 3d 813, 357 N.E.2d 656 (2d Dist. 1976). The "able" requirement refers to financial ability and requires command of the necessary funds to complete the purchase. *O'Brien v. Kawazoye*, 27 Ill. App. 3d 810, 327 N.E.2d 236 (1st Dist. 1975); *Garrett v. Babb*, 24 Ill. App. 3d 941, 322 N.E.2d 217 (2d Dist. 1975). See notes 106-22 and accompanying text *infra*.

22. *Beider v. Eugene Matanky & Assoc.*, 55 Ill. App. 3d 354, 371 N.E.2d 29 (1st Dist. 1977). Recovery of a commission is not dependent upon consummation of a sale. *J.J. Harrington & Co. v. Timmerman*, 50 Ill. App. 3d 404, 365 N.E.2d 721 (1st Dist. 1977); *Ellis Realty v. Chapelski*, 28 Ill. App. 3d 1008, 329 N.E.2d 370 (1st Dist. 1975). An attorney representing a property owner should be wary of advising the insertion of a clause limiting liability for the commission to the consummation of the sale; such advice may run afoul of the Broker-Lawyer Accord. See, e.g., REAL ESTATE LITIGATION, *supra* note 20, at § 6.36 (1975). Such a clause could be construed as an effort on the part of the attorney to minimize the compensation of the broker.

Even where the broker is to receive the commission on the consummation of the sale, the broker is entitled to the commission if the transaction fails due to the fault of his principal. *Haas v. Cohen*, 10 Ill. App. 3d 896, 295 N.E.2d 28 (3d Dist. 1973). In fact, the broker may be entitled to a commission if he presents a ready, willing and able buyer to the one who signed the listing, even if that person does not hold the full interest in the property. See *Robertson v. Reed*, 35 Ill. App. 3d 525, 341 N.E.2d 402 (4th Dist. 1976); *Ellis Realty v. Chapelski*, 28 Ill. App. 3d 1008, 329 N.E.2d 370 (1st Dist. 1975); *Erbach and Haunroth Realtors v. Burnett*, 31 Ill. App. 3d 236, 333 N.E.2d 592 (1st Dist. 1975).

23. The execution of the contract does not put to rest the involvement of the broker. When the seller and buyer execute the contract, the buyer will normally deposit a percentage of the purchase price as earnest money. The earnest money is commonly held by the broker in a separate account, applied to the purchase price at closing, and the broker's commission is typically taken from this deposit. By making sure that the down payment is made, the broker is, in effect, insuring that his commission will be paid.

The broker has the duty of accounting for all monies coming into his possession which belong to others. ILL. REV. STAT. ch. 111, § 5732(e)(7) (1977). The broker may not commingle such funds. *Id.* at § 5732(e)(8). The earnest money is shown as a credit to the buyer on the closing statement. The broker normally will remit to the seller at closing the excess, if any, of the earnest money over the broker's commission. Since the earnest money is commonly ten percent of the purchase price, and the commission is somewhere around six percent of the purchase price, the broker usually will owe the seller some money.

24. See note 6 *supra*.

When the contract of purchase has been executed, the broker's remaining task is to see that the transaction closes. Since, at this point, there is usually at least one lawyer in the picture,<sup>25</sup> the broker begins to perform courier functions such as making sure that a convenient closing date has been set, advising the buyer as to utility charges, and delivering documents at the request of either party.<sup>26</sup>

The foregoing scenario clearly shows the extent to which the real estate brokerage industry is entrusted with the public interest. Brokers facilitate the execution of binding legal obligations, by listing contracts and contracts of sale, at a stage in the transaction when no lawyer has been consulted.<sup>27</sup> The listing agreement severely restricts the owner's freedom concerning the disposition of the property. Consequently, a property owner should protect himself by having an attorney review not only the sales contract but also the listing agreement before it is executed.<sup>28</sup>

#### THE DUTIES OF THE BROKER

At the moment the listing agreement is executed by the homeowner and the broker, the broker becomes the agent of the homeowner and is subject to the law of agency.<sup>29</sup> After a prospective purchaser has been located, the

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25. Because it is the seller who is generally responsible for the preparation of the closing documents, the seller usually has an attorney. This is the custom in the Chicago area and it may vary by locale. Further, most buyers buy with the aid of a home mortgage loan. The mortgage lender will have an attorney but he or she is at work behind the scenes.

26. Finally, when the deed is delivered and the money paid out the broker is sure that his efforts have been rewarded because the commission is paid at the closing. Although this is the custom, a sharp broker can require, by the terms of the listing, that the commission be paid before the closing.

27. The failure to consult an attorney is often a result of the broker's suggestion. Such advice violates the Accord but is nonetheless common. Brokers as well as representatives from lending institutions tell buyers that they either need not or should not consult an attorney.

28. Although the proposition that an owner should consult an attorney before signing the listing may sound self-serving, it really can protect the owner. Perhaps an attorney could have prevented the result in *Badeaux v. Rohrer*, 182 Ill. App. 114 (1913), in which the broker was entitled to a commission even though the seller, who never had good title, could not complete the transaction.

29. The term "agent" is broader than the term "broker." A broker holds himself or herself out to the public generally and only becomes an agent for a specific purpose. An agent maintains a continuing relationship with a particular principal. Thus, every broker is an agent, but every agent is not always a broker. *DeGraw v. State Security Ins. Co.*, 40 Ill. App. 3d 26, 33, 351 N.E.2d 302, 308 (1st Dist. 1976).

No particular form is required to create an agency relationship. All that is necessary is that the broker act with the consent of the principal. Consent can be given in writing, orally, or by implication from conduct. *Bau v. Sobut*, 50 Ill. App. 3d 732, 365 N.E.2d 724 (1st Dist. 1977). See also *Cole v. Brundage*, 36 Ill. App. 3d 782, 344 N.E.2d 583 (1st Dist. 1976); *Van C. Argiris Co. v. Caine Steel Co.*, 20 Ill. App. 3d 315, 314 N.E.2d 361 (1st Dist. 1974); *Dickerson Realtors, Inc. v. Frewert*, 16 Ill. App. 3d 1060, 307 N.E.2d 445 (2d Dist. 1974); *Bennett v. H.K. Porter Co., Inc.*, 13 Ill. App. 3d 528, 301 N.E.2d 155 (1st Dist. 1973). Although the broker is normally the agent of the seller, the broker can become the agent of the buyer. *Duffy v. Setchell*, 38 Ill. App. 3d 146, 347 N.E.2d 218 (2d Dist. 1976).

broker must keep the parties interested in order to get from the negotiation stage to the contract stage. It is this function that most seriously calls into question the duty of the broker. The broker makes his living by bringing together willing buyers and willing sellers who agree to an acceptable price. This occupational goal of the broker raises a possible conflict between the broker's duty to his principal, the homeowner (seller), and his own interest in securing a sale and therefore a commission. For example, the broker may indicate to the prospective buyer that the seller will take less than the asking price. Judges and commentators are divided on whether or not this is a breach of the broker's fiduciary duty.

On the one hand, there is the view that any broker who induces a prospective buyer to believe that the property can be bought for less than the asking price fails to discharge his duty to his seller and thereby forfeits all his rights to claim a commission.<sup>30</sup> In contrast, it also has been suggested that while the broker certainly owes duties to the seller, those duties do not include the requirement that he accurately represent the price at which the property may be acquired. When the broker tells the buyer that the lowest acceptable price is much higher than the actual acceptable price there is no problem. The seller will only be benefited and although the buyer may be unhappy he is without a cause of action since he has no legal right to the owner's lowest price.<sup>31</sup> There are decisions stating that "the broker's fiduciary duties require his obtaining the highest price and best terms reasonably believed available for the principal."<sup>32</sup> However, due to the

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30. In *Haymes v. Rogers*, 70 Ariz. 257, 219 P.2d 339 (1950), the salesman informed the buyer that the seller would probably accept an \$8500 offer. This was held to be a violation of the agent's duty to the principal because the seller had told the agent to get \$9500 for the property. This breach of the duty of loyalty by the agent resulted in forfeiture of the commission.

31. In *Sanders v. Stevens*, 23 Ariz. 370, 203 P. 1083 (1922), the agent informed the buyer that he was authorized to sell the property for \$6500. Later, the buyer discovered the agent could have sold for \$6000 with the seller's permission. Buyer sued for misrepresentation. The court refused to find the conduct actionable because the buyer could not show that he had acted upon these representations to his disadvantage. See also *People v. Davis*, 137 Cal. App. 378, 30 P.2d 573 (1934); *Buckley v. Hatupin*, 198 Wash. 543, 89 P.2d 212 (1939).

32. See, e.g., *Moehling v. W.E. O'Neil Const. Co.*, 20 Ill. 2d 255, 170 N.E.2d 100 (1960) (when agent purchases property from principal there is a duty to disclose the price which could be obtained for the property as well as the facts about the desirability of sale now and other potential uses of the property); *Rieger v. Brandt*, 329 Ill. 21, 160 N.E. 130 (1928) (agent failed to disclose to principal several offers to buy land at a higher price and purchased property himself at a lower price; *held*: broker has a duty to keep the principal informed of all matters relating to the agency); *Pawlowic v. Pearce*, 59 Ill. App. 2d 153, 207 N.E.2d 155 (2d Dist. 1965) (where broker informed seller that price of property had to be reduced to permit sale and later sold it for higher price, keeping the profit, court found fraud as well as a breach of duty to fully disclose all restrictions and circumstances of the sale). See also A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* (1978); Stambler & Stein, *The Real Estate Broker—Schizophrenia or Conflict of Interest*, 28 D.C. B. ASSOC. J. 16 (1961); 17 A.L.R.2d 904 (1951).



broker's self-interest in securing the sale and thus his commission, it is unlikely that this occurs in the typical transaction.<sup>33</sup>

By recognizing that the realtor is acting primarily for himself or herself, it becomes clear that not only in negotiating the purchase price, but also in the other terms of the contract of sale (to say nothing of the listing agreement), the broker may be looking for a certain sale rather than for negotiations which will result in the best price and best terms for his or her principal, the seller. The broker is given greater impetus to avoid these negotiations by the terms of the *Quinlan & Tyson* cases and the Accord, which allow the broker to insert factual information in the blanks of standard form contracts customarily used in the community.

### *Duties of the Broker*

There are, however, certain fiduciary duties owed by the realtor to the seller that are enforced by the courts. The broker must disclose all reasonable attempts at negotiation and all reasonable offers to his principal. He has the duty of full disclosure of all relevant information. Although this duty has long been recognized in Illinois,<sup>34</sup> it was emphasized recently in *Glass v. Burkett*.<sup>35</sup> In *Glass*, the seller<sup>36</sup> sued the real estate broker to recover damages for the broker's alleged violation of his fiduciary duties in the sale of a tract of land. The seller had listed the property, consisting of a 30-acre tract and a home, with the defendant real estate broker. The seller specified a price of \$50,000 for the tract and instructed the broker to sell the property in one tract.

Shortly after the property was listed, a prospective purchaser offered to pay \$25,000 for one and one-half acres<sup>37</sup> including the house. During this same period, another party, a relative of the owner, expressed interest in purchasing the entire tract at a price lower than the asking price. The broker never told the relative that the property could be purchased for less than the asking price. Moreover, the broker failed to inform the owner of these offers and instead purchased the entire tract himself for \$40,420. Within hours of the sale to the broker, he accepted the offer of \$25,000 for the acre and a half and later sold the remaining acreage for \$35,000 resulting in a profit of \$19,580.<sup>38</sup>

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33. Stambler & Stein, *The Real Estate Broker—Schizophrenia or Conflict of Interest*, 28 D.C. B. Assoc. J. 16 (1961); 17 A.L.R.2d 904 (1951).

34. See note 32 *supra*.

35. 64 Ill. App. 3d 676, 381 N.E.2d 821 (5th Dist. 1978).

36. The vendor was actually the co-executor of the deceased owner's estate.

37. The offer was accompanied by earnest money.

38. The transaction between vendors and broker and the transaction between broker and the third party were closed on the same day. The vendors were informed of the broker's sale to the third-party after the contract of sale from the vendors to defendant-broker had been executed, but obviously before the closing. Based on this fact, the defendant raised the issue of ratification. The court did not accept this contention, since the vendors were not timely in-

Currently, as at the time of these transactions, the Rules of the Illinois Department of Registration and Education, promulgated to administer the Real Estate Brokers and Salesmen License Act, dictate that a real estate broker must disclose to sellers all material information as soon as practicable. The rules also require the broker to disclose, in writing to all parties to the transaction, any interest he may have in the subject real estate as purchaser, seller, or otherwise.<sup>39</sup>

Accordingly, the court found that the broker breached his fiduciary duty by failing to disclose the \$25,000 offer and in failing to obtain from the prospective purchaser of the whole tract a refusal to purchase for any sum in excess of the defendant's purchase price.<sup>40</sup> Further, the court ruled that when the dominant party in a fiduciary relationship appears to gain, the transaction is presumptively fraudulent.<sup>41</sup> To overcome this presumption, the dominant party must show: (1) full disclosure of all relevant information to the subservient party; (2) adequate consideration; and (3) competent and independent advice to the principal before completing the transaction.<sup>42</sup> The defendant here failed to meet this burden at trial.<sup>43</sup>

In connection with the completion of a contract of purchase, however, activities of precisely the same nature are expressly permitted by *Quinlan & Tyson*. It is rare to have only *one* form contract used in a given community. Obviously, a real estate office will use the form best designed to bring about a certain sale. The availability of other forms often is concealed by the broker. Any statement made by the broker about the contract of purchase would be the antithesis of independent advice. Both buyer and seller should be made aware of the broker's personal, and therefore, adverse interest. They should both be represented by independent counsel before the contract of purchase is signed. For the broker to encourage anything less should be recognized for what it is: violation of the broker's fiduciary duty.

While it is clear that some duties are owed by the real estate agent to the principal, it is much less clear what duties the real estate agent owes to the public in general and to parties to real estate transactions other than the principal. In some jurisdictions the broker is considered to be the agent of

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formed of the *offer* from the third party. It is interesting that the court completely ignored the question of the broker's duty of obedience to the principal.

39. The applicable rule can be found in DEPT. OF REGISTRATION AND EDUC., RULES AND REGULATIONS FOR THE ADMINISTRATION OF THE REAL ESTATE BROKER AND SALESMEN LICENSE ACT, Rule V (1974) (amended 1976). The authority to promulgate rules and regulations issues from ILL. REV. STAT. ch. 111, § 5715 (1977). Note that at the time of this case, the Illinois Brokers and Salesmen License Act was contained in Ch. 114½ but has since been placed in the earlier chapter.

40. *Glass v. Burkett*, 64 Ill. App. 3d 676, 681, 381 N.E.2d 821, 824 (5th Dist. 1978).

41. *Id.* at 680, 381 N.E.2d at 824.

42. *Id.*

43. *Id.* at 683, 381 N.E.2d at 826. In addition, the court, finding that the broker's concealment was intentional and not in good faith, awarded punitive damages to the plaintiff. *Id.*

both the buyer and seller.<sup>44</sup> In those states a buyer defaulting on a real estate contract can be found liable for the broker's commission.<sup>45</sup> Illinois courts, however, consider the broker the agent of the seller only,<sup>46</sup> a crucial fact often unknown to the buyer. Although the prospective buyer works with and through the realtor, the broker or salesperson is employed by the seller

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44. See, e.g., *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967). In New Jersey, the broker's commission is contingent not only on presenting a willing buyer, but also on the signing of a sales contract, unless failure to close is the fault of the vendor. *Id.* at 551, 236 A.2d at 855.

The *Dobbs* court held that a broker can sue a purchaser who refuses to carry out the contract with a vendor, even if the broker looks to the vendor for payment of the commission. The theory is that if the purchaser defaults for no valid reason, there has been a breach of an implied promise to complete the transaction by the buyer. *Id.* at 561, 236 A.2d at 860. This view has eroded somewhat since it is now held in New Jersey that financial inability to carry out the transaction is not enough fault by the buyer to allow the broker to sue buyer for the lost commission. See *Joseph J. Murphy Realty, Inc. v. Shervan*, 159 N.J. Super. 546, 388 A.2d 990 (1978).

California is in accord with the *Dobbs* principle of purchaser liability. See *Donnellan v. Rocks*, 22 Cal. App. 3d 925, 99 Cal. Rptr. 692 (1972). See also *Probst v. DiGiovanni*, 232 La. 811, 95 So. 2d 321 (1957); *Grossman v. Herman*, 266 N.Y. 249, 194 N.E. 694 (1935); *Danciger Oil & Ref. Co. v. Wayman*, 169 Okla. 534, 37 P.2d 976 (1934); *Livermore v. Crane*, 26 Wash. 529, 67 P. 221 (1901). But see *Professional Realty Corp. v. Bender*, 216 Va. 737, 222 S.E.2d 810 (1976).

New York has held that the broker can recover from prospective purchasers because the buyer essentially makes an implied employment contract with the broker. See *McKnight v. McGuire*, 191 N.Y.S. 323, 117 Misc. 306 (N.Y.S. Ct. 1921).

Other states permit the broker to recover the commission from a buyer only if the default was in bad faith. See *Treadway v. Piazza*, 156 So. 2d 328 (La. Ct. App. 1963); *Browner v. Cumbie*, 264 S.W. 497 (Tex. Civ. App. 1924).

45. See note 44 *supra*. See also, *Liability of Defaulting Purchaser to Owner's Broker or Auctioneer*, 30 A.L.R.3d 1395 (1970). In Illinois, a broker claiming a commission from the seller when the buyer defaults must look to the terms of the contract of purchase: the seller is allowed to retain the earnest money, out of which must be paid the broker's commission. See, e.g., *Cole Legal Forms No. 672*; *Chicago Title Insurance Company Forms A, A-1, B*; *DuPage Board of Realtors Form No. 100*; *Oak Park Board of Realtors Form No. 2-1968*; *Barrington Board of Realtors—Approved Form (Revised 8/76)*; *North Side Real Estate Board Form R 7/77*.

46. A definite contract of employment is necessary to create this agency relationship between broker and seller. However, no particular form is required. *Bau v. Sobut*, 50 Ill. App. 3d 732, 365 N.E.2d 486 (1st Dist. 1977); *Van C. Argiris Co. v. Caine Steel Co.*, 20 Ill. App. 3d 315, 314 N.E.2d 361 (1st Dist. 1974); *Dickerson Realtors, Inc. v. Frewert*, 16 Ill. App. 3d 1060, 307 N.E.2d 445 (2d Dist. 1974).

However, the broker can initially be the agent for the buyer. In that case, the broker cannot subsequently become the agent of the seller also without the full consent of both parties. *Duffy v. Setchell*, 38 Ill. App. 3d 146, 347 N.E.2d 218 (2d Dist. 1976); *Fairfield Savings & Loan v. Kroll*, 106 Ill. App. 2d 296, 246 N.E.2d 327 (1st Dist. 1969). In *Duffy*, the broker was approached by the prospective buyer who asked for assistance in purchasing a farm. During conversations with the farm's owner, the broker procured a listing agreement with the owner. The court found this a conflict of interest and a double agency. The court said that as a double agent without the knowledge of either party the broker could not serve either party in a fiduciary capacity. The broker's commission was therefore withheld. *Duffy v. Setchell*, 38 Ill. App. 3d 146, 150, 347 N.E.2d 218, 221 (2d Dist. 1976).

and owes duties as an agent only to the seller. The broker's duties to the buyer are much more limited.

The broker in Illinois has no duty to disclose the seller's lowest price to the buyer. Indeed, to do so would probably subject the broker to a charge of violating his fiduciary duties to the seller.<sup>47</sup> Nonetheless, the realtor does owe some duties to the buyer; he cannot, for example, enjoy secret profits at the expense of the buyer.<sup>48</sup> The realtor cannot make material misrepresentations to the buyer, such as inducing the buyer to purchase under a misconception as to the property's title, area, quality, and zoning.<sup>49</sup> Of course, a broker cannot act for both the seller and the buyer without full disclosure.<sup>50</sup> The Illinois Appellate Court has recognized the fact that an agent (real estate broker or salesman) may owe a duty to third persons. The duty to regard the rights of others is no less binding upon a person because he happens simultaneously to be the agent of another.<sup>51</sup>

In April of 1978, the Illinois Appellate Court for the Third District had the opportunity to consider anew the duties owed by a broker or salesman to buyers and the general public. In *Blocklinger v. Schlegel*,<sup>52</sup> the defendants listed certain property with a real estate agency. The agency, as a member of the local multiple listing service, relisted the property with the Rock Island County Multiple Listing Service and with certain other reciprocating boards of realtors. The listing realtor found a ready, willing, and able purchaser, the plaintiff, who contracted with defendants to purchase the property. When the defendants discovered that the plaintiff was a real estate broker by

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47. In *Haymes v. Rogers*, 70 Ariz. 257, 219 P.2d 339 (1950), the Arizona court held it a breach of loyalty for the broker to reveal seller's lowest bargaining price. See note 30 and accompanying text *supra*.

48. *Pawlowic v. Pearce*, 59 Ill. App. 2d 153, 207 N.E.2d 155 (2d Dist. 1965), is a good example of secret profits. In that case, the broker got a seller to agree to lower the selling price. Then the broker sold the property to the buyer for a higher price, keeping the difference in profits for himself. Secret profits would usually involve a breach of the broker's duty to disclose all transactions to the principal. See cases cited at note 32 *supra*.

49. See ILL. REV. STAT. ch. 111, § 5732(e)(1) (1977). The board may suspend or revoke the registration of the broker for any substantial misrepresentation.

50. *Duffy v. Setchell*, 38 Ill. App. 3d 146, 347 N.E.2d 218 (2d Dist. 1976) (broker getting listing from seller while an agent for the buyer); *Fairfield Savings & Loan v. Kroll*, 106 Ill. App. 2d 296, 246 N.E.2d 327 (1st Dist. 1969) (banker procuring mortgage and insurance for buyer while at the same time representing sellers); *Neal v. Bloomfield*, 166 Ill. App. 402 (3d Dist. 1911) (agent for owner did not act in good faith toward his principal because he kept other buyers away in favor of another buyer); *Hampton v. Lackens*, 72 Ill. App. 442 (3d Dist. 1897) (defendant acted as agent for both parties in a trade of real estate and for this reason was denied his commission).

51. *Bliesener v. Baird & Warner, Inc.*, 88 Ill. App. 2d 383, 386, 232 N.E.2d 13, 15 (1st Dist. 1967). In *Bliesener*, the broker attempted to lease a house knowing the lessee could never take possession because the owner's mortgage was in default. This was held to be a breach of the broker's duty, not to the principal, but to the third party lessee. For breach of that duty, the real estate agency was liable to the renter for his loss of advance rent paid to the landlord who could not perform the lease because the mortgage was in default.

52. 58 Ill. App. 3d 324, 374 N.E.2d 491 (3d Dist. 1978).

profession, they attempted to unilaterally rescind the contract. The prospective purchaser obtained a summary judgment ordering specific performance of the real estate contract and the defendants appealed.

The basis of the defendants' argument was that the plaintiff, as a real estate broker who belonged to the local multiple listing service, owed to the defendants all the fiduciary duties that any realtor owes to his principal. This duty arose, defendant-sellers contended, by virtue of the sub-agency created by the multiple listing service.

The appellate court, after an examination of the particular multiple listing agreement involved, found that no fiduciary duty existed between the plaintiff and the defendants under the agreement.<sup>53</sup> Although the court assumed that a relisting did occur pursuant to the multiple listing agreement, it refused to find that such relisting created any contractual privity between the plaintiff-purchaser and the defendant-seller. The court noted that the listing agreement gave the original realtor an exclusive right to sell<sup>54</sup> and contemplated possible successive listings with other realtors who were members of the cooperative listing service.<sup>55</sup> Since there was no proof that the plaintiff became aware of the property's availability through any method usually known only to those in the profession nor any proof of fraud or collusive dealing, no agency relationship existed between the parties.<sup>56</sup> The court, in affirming the summary judgment, found that the plaintiff had no duty to the defendants in this particular sale merely because there was a cooperative listing agreement among the local realtors. The court also noted that the business of being a realtor is not so entwined with the public interest as to require dealing as a fiduciary with everyone. To establish a fiduciary duty the court felt that the charging party must prove that a realtor has been employed by him and is therefore his agent.<sup>57</sup> Since there was no fiduciary duty, the plaintiff had no obligation to disclose his occupation to the defendant.<sup>58</sup>

The case would have been decided differently had the plaintiff-purchaser been the listing realtor rather than merely the sub-listee. The court reasoned that under such circumstances the plaintiff, as a fiduciary, would be obligated to disclose his dealings with the land and would have placed in issue any representations he had made concerning the value of the land.<sup>59</sup> Because of the sub-listee intervention no fiduciary duty arose.

In the ordinary multiple listing situation involving cooperating brokers, the sub-agent is bound by the terms of the contract between the vendor and

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53. *Id.* at 326, 374 N.E.2d at 493.

54. *Id.* See note 18 *supra*.

55. *Blocklinger v. Schlegel*, 58 Ill. App. 3d 324, 326, 374 N.E.2d 491, 493 (3d Dist. 1978).

56. *Id.*

57. *Id.* at 326-27, 374 N.E.2d at 493.

58. *Id.* at 327, 374 N.E.2d at 493.

59. *Id.*

the original broker.<sup>60</sup> Yet in *Schlegel*, the court, in effect, distinguished between obligations based on an employment contract and obligations based on sub-agency. The court did not, however, expressly consider the correctness or utility of this distinction. The court did not root the plaintiff's freedom from liability in the law of agency or sub-agency. It merely stated that since the cooperating broker was not employed by the owner, he owed him no greater duty than was owed the public at large.<sup>61</sup>

Of course, if the court had relied on agency law, it would have found that a fiduciary obligation ran from the cooperating broker to the owner. It is likely the court recognized that brokers have interests adverse to those of their employers but adopted this principle only in the case of a sub-agent rather than an agent.

#### DEVELOPMENTS UNDER THE REAL ESTATE BROKERS AND SALESMEN LICENSE ACT

In late 1977 and 1978 the Illinois courts dealt with several cases involving the Real Estate Brokers and Salesmen License Act.<sup>62</sup> The Second District Appellate Court restated<sup>63</sup> the Act's proposition that an unregistered person is not entitled to compensation for activities falling within the scope of the Real Estate Brokers and Salesmen Act.<sup>64</sup> The court recognized the need for a strong licensing act and public protection by holding that the Act could not be circumvented by the unregistered person's self-characterization as an "introducer" instead of a real estate broker or salesman.<sup>65</sup>

Although the Act prohibits payment of consideration to unregistered brokers and salesmen, it does not encompass persons (or their employees) who perform any of the functions of a broker or salesman<sup>66</sup> with respect to their

60. See *Van C. Argiris Co. v. Caine Steel Co.*, 20 Ill. App. 3d 315, 314 N.E.2d 361 (1st Dist. 1974).

61. *Blocklinger v. Schlegel*, 58 Ill. App. 3d 324, 327, 374 N.E.2d 491, 493 (3d Dist. 1978).

62. ILL. REV. STAT. ch. 111, § 5701-5743 (1977).

63. *Kilbane v. Collins*, 56 Ill. App. 3d 707, 372 N.E.2d 415 (2d Dist. 1978) (plaintiff was denied a commission for his negotiations since such activity required a license under the Act). The holding is required by ILL. REV. STAT. ch. 111, § 5714 (1977).

64. See *Central Nat'l Bank v. Alexander Mkt., Inc.*, 47 Ill. App. 3d 58, 361 N.E.2d 766 (1st Dist. 1977) (defendant's counterclaim for commissions due on actual or projected real estate sales was denied because defendant was not licensed); *Kilbane v. Dyas*, 33 Ill. App. 3d 439, 337 N.E.2d 217 (2d Dist. 1975) (activity of "finding" prospective purchasers required a real estate license, even though plaintiff never participated in negotiations over the property); *Opalka v. Yellen*, 14 Ill. App. 3d 779, 303 N.E.2d 265 (1st Dist. 1973) (unlicensed defendant's counterclaim for a "finder's fee" dismissed).

65. *Kilbane v. Collins*, 56 Ill. App. 3d 707, 712, 372 N.E.2d 415, 419 (2d Dist. 1978): "Unlicensed brokers in more than one state have unsuccessfully attempted to convince the courts that they were merely acting as middlemen and not brokers." See Comment, *Recovery of Commission by Unlicensed Real Estate Brokers*, 80 DICK. L. REV. 500, 502-04 (1976).

66. See note 2 *supra* for the definition of a salesman.

own property.<sup>67</sup> The Illinois Appellate Court for the First District construed this statutory exemption in *Brandenberry Park East Apartments v. Zale*.<sup>68</sup> The *Brandenberry* dispute involved the defendant contract seller's alleged mismanagement of an apartment complex. When the plaintiff refused to pay the defendants' management fees, as required by their settlement agreement, the defendants refused to transfer title to the real property. The plaintiffs then sued for specific performance claiming they were entitled to a warranty deed. In addition, the plaintiffs sought damages for building code violations and recovery of management fees paid to the defendants alleging that the management fee was analogous to a commission and that the defendants therefore were not entitled to compensation because they had no real estate broker's license. The defendants counterclaimed for the management fees.<sup>69</sup>

The court acknowledged that the Real Estate Brokers and Salesmen License Act does not refer to property management and stated that a property manager who shows apartments for rent in the property he is managing is not required to have a real estate broker's license.<sup>70</sup> In support of this proposition, the court noted that no decision required a property manager to have a broker's license.<sup>71</sup> Furthermore, the court pointed out that the defendants were compensated for their management of the complex, not simply for renting apartments. Finally, relying on the specific language of the statute, the court held that the Act was inapplicable to any owner or lessor of property acting incident to the management of the property. Since the defendants were the contract sellers under the articles of agreement, they were owners of an interest in real estate and therefore exempted by the Act from any requirement of a license.<sup>72</sup> Therefore, the court affirmed the liability of the plaintiff to pay management fees. This decision recognized that the Act was meant to protect the public and not to interfere with an owner's disposition of his property.

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67. ILL. REV. STAT. ch. 111, § 5713 (1977), states:

The provisions of this Act shall not apply to any person, association, copartnership or corporation who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular salaried employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein, and not in connection with a whole or partial vocation of selling or offering to sell, buying or offering to buy, or negotiating the purchase or sale or exchange of real estate, or the leasing or offering to lease, or renting or offering for rent of any real estate, or the negotiation of leases therefor or of the improvements thereon. . . .

68. 63 Ill. App. 3d 253, 379 N.E.2d 674 (1st Dist. 1978).

69. *Id.* at 258, 379 N.E.2d at 678. The defendants' counterclaim also involved a claim that plaintiffs were obligated to pay bills of forty-nine creditors to whom plaintiffs had become indebted.

70. *Id.*

71. *Id.*

72. *Id.* See ILL. REV. STAT. ch. 111, § 5713 (1977).

Judicial recognition of the legislature's intent to protect the public through the Act is revealed by recent decisions involving realtors' racial discrimination in "steering"<sup>73</sup> clients away from particular housing. The Act was amended in 1975 to prohibit explicitly all forms of racial discrimination, including "steering" and volunteering true information regarding racial makeup.<sup>74</sup> However, prior to these amendments, the Act did not address racial discrimination, but more broadly prohibited dishonest dealing, unworthiness, incompetency, and misrepresentation.<sup>75</sup> Although these recent decisions involved conduct which occurred prior to the amendments, the appellate courts applied the broad sections of the old Act (retained in the amended Act) in order to embrace the realtors' racially discriminating conduct.<sup>76</sup>

73. The term "steering" refers to a variety of techniques by which real estate brokers attempt to direct the sale of homes in certain neighborhoods according to race. See Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 809-10 (1976). See note 76 *infra*.

74. ILL. REV. STAT. ch. 111, § 5732(e) (1977).

75. ILL. REV. STAT. ch. 114½, § 115(e) (1973) (current version at ILL. REV. STAT. ch. 111, § 5732(e) (1977)). See note 76 *infra*.

76. In *Ranquist v. Stackler*, 55 Ill. App. 3d 545, 370 N.E.2d 1198 (1st Dist. 1977), the plaintiff, a real estate salesman, had been found by the Department of Registration and Education, the agency responsible for administering the Real Estate Brokers and Salesmen License Act, to have violated the Act by "inducing persons to purchase property through statements which misrepresented and distorted the racial composition and the quality of certain neighborhoods in Chicago." *Id.* at 546, 370 N.E.2d at 1200. The finding of improper conduct rested on sections of the old Act which established certain general causes for the suspension or revocation of a realtor's license (e.g., unworthiness, incompetency, dishonest dealing, and violations of Departmental regulations). ILL. REV. STAT. ch. 114½, § 115(e)(11), (15), (21) (1973) (current version at ILL. REV. STAT. ch. 111, § 5732(e)(11), (15), (21) (1977)). The Department suspended the realtor's license for sixty days. The Realtor brought this action in circuit court, seeking review of the Director's determination. The circuit court reversed the suspension order and held that the conduct described in the Department's complaint was outside of that intended to be regulated by the License Act.

When the case came before the First District Appellate Court, the court noted that an examination of the statute's terms constituted a case of first impression in Illinois. *Id.* at 551, 370 N.E.2d at 1203. The court emphasized that "[t]he essence of the Act is remedial . . ." and therefore the statute is entitled to liberal construction for the promotion of the public welfare. *Id.* at 549, 370 N.E.2d at 1202. The court thus disposed of the argument that the Act is a penal measure to be strictly construed against the State. The court commented on the quality of the conduct of the realtor, stating that *unsubstantiated* comments about the quality of a neighborhood, because they are made by a licensed professional salesman, could constitute *misrepresentation* "bordering on inequitable and fraudulent bargaining." *Id.* at 556, 370 N.E.2d at 1207 (emphasis added). The court found that the conduct of the real estate salesman violated the licensing act and ordered his suspension reinstated. *Id.* at 557, 370 N.E.2d at 1207. Left unanswered, however, was the question of whether it would have been dishonest, incompetent, or untrustworthy for the realtor to have made true and substantiated comments about the racial composition of the neighborhood. *Id.* at 556-57, 370 N.E.2d at 1207. For a discussion of the Wisconsin judiciary's interpretation of similar terms in the Wisconsin statute, see Note, *Housing Law—Real Estate Broker's Liability for Racial Discrimination Held Not Grounds for License Revocation—Ford v. Wisconsin Real Estate Examining Board*, 1971 WIS. L. REV. 962, 966-69.



While the steering cases<sup>77</sup> stand for the broad proposition that the Act is to be liberally construed for the protection of the public, this liberal construction is indeed mild given the subsequent amendments to the Act which expressly forbid steering, the Illinois constitutional mandate prohibiting discrimination, and contemporary attitudes toward racial discrimination. The broad proposition, nonetheless, must endure and be applied to protect the public.

Another development under the Licensing Act also involved a liberal construction of the Act. A salesman had his license suspended by the Department of Registration and Education because he had been found guilty of extortion and placed on probation.<sup>78</sup> The felony conviction was a result of the plaintiff's acceptance of monies in exchange for the renewal of liquor licenses while he was the Liquor Commissioner of Lake County. His salesman's license was suspended for a period coterminous with his probationary period. On appeal, the plaintiff contended that the suspension should be set

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McKey & Poague, Inc. v. Stackler, 63 Ill. App. 3d 142, 379 N.E.2d 1198 (5th Dist. 1978), was a similar case. The applicable statute contained the same provisions as those discussed in *Ranquist*. ILL. REV. STAT. ch. 114½, §§ 101-125 (1971) (current version at ILL. REV. STAT. ch. 111, §§ 5701-5743 (1973)). It also called for suspension where the registrant made a substantial misrepresentation or engaged in untruthful advertising. *Id.* at § 108(e)(1) (current version at § 5732(e)(1)). In addition to these statutory provisions, the Department had promulgated a rule barring certain discrimination by brokers and salesmen: no realtor could enter a listing agreement prohibiting sale or rental to any person because of race, religion, or national origin; nor could any registrant act as broker or salesman where the disposition of the property was restricted by race, religion, or national origin. Rule VII of the RULES AND REGULATIONS FOR THE ADMINISTRATION OF THE ILLINOIS REAL ESTATE BROKERS AND SALESMEN ACT (1972), cited in *McKey & Poague, Inc. v. Stackler*, 63 Ill. App. 3d 142, 145, 379 N.E.2d 1198, 1200 (1st Dist. 1978). The court followed *Ranquist*, but went on to note that the statutory language was not a necessary basis for the holding in the instant case since Rule VII of the Department clearly prohibited racially discriminatory conduct. *McKey & Poague, Inc. v. Stackler*, 63 Ill. App. 3d 142, 150, 379 N.E.2d 1198, 1204 (5th Dist. 1978).

Another recent steering case involved a complaint against a real estate salesman in *Strickland v. Dept. of Registration and Educ.*, 60 Ill. App. 3d 1, 376 N.E.2d 255 (1st Dist. 1978). In *Strickland*, the realtor was willing to show listings in Berwyn and Cicero to a white person thirteen days before he told a black person that there were no available homes in Cicero. Upon this evidence, the majority of the examining committee found that the plaintiff violated a 1975 amendment to the Illinois Real Estate Brokers and Salesmen License Act, which prohibits realtors from stating to prospective purchasers that available realty is unavailable. ILL. REV. STAT. ch. 111, § 5732(e)(29) (1977). The examining committee recommended suspension of the plaintiff's license for three months and the Director of the Department agreed. The circuit court affirmed the suspension and the plaintiff appealed. Plaintiff argued that the complaint filed in the administrative proceedings failed to allege that plaintiff had available listings that she secreted from the black client. The court noted that Illinois law does not require that the complaint in an administrative proceeding be drawn with the same precision required of pleadings in a judicial proceeding. *Id.* at 6, 376 N.E.2d at 258, citing *Carrao v. Board of Educ.*, 46 Ill. App. 3d 33, 37, 360 N.E.2d 536, 540 (5th Dist. 1977). See also *Kelly v. Police Bd.*, 25 Ill. App. 3d 559, 564, 323 N.E.2d 624, 627 (5th Dist. 1975), appeal denied, 58 Ill.2d 596 (1975).

77. See note 76 *supra*.

78. *Coles v. Dep't. of Registration and Educ.*, 59 Ill. App. 3d 1046, 376 N.E.2d 269 (1st Dist. 1978).

aside because "the suspension of his real estate salesman license for a period coterminous with his federal probationary status is merely an infliction of punishment without any relation to the public interest. . . ." <sup>79</sup> The appellate court, in rejecting plaintiff's contention, noted that the legislative purpose of the License Act was to prevent injury to the public by assuring that the profession will be practiced with honesty and integrity and to exclude those who are incompetent or unworthy. <sup>80</sup>

The court then turned to the section of the License Act which gives the Department discretion, after considering the public interest, to determine whether a registrant's criminal conviction requires the revocation or suspension of the registrant's real estate license. <sup>81</sup> The court found that the Department's discretion did not violate the due process and equal protection clauses of the fourteenth amendment. <sup>82</sup>

The court granted that the conduct of the plaintiff was unconnected with the sale of real estate, but found that the conduct nonetheless "suggest[ed] a pattern of financial dishonesty by an individual in a position of public trust." <sup>83</sup> The court declined to hold that the Real Estate Brokers and Salesmens License Act should be construed so as to require that suspension or revocation of a license be for conduct related to the profession. <sup>84</sup> The

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79. *Id.* at 1047-48, 376 N.E.2d at 271.

80. *Id.* at 1048, 376 N.E.2d at 271, citing *Kaplan v. Dep't. of Registration and Educ.*, 46 Ill. App. 3d 968, 361 N.E.2d 626 (1st Dist. 1977). The court went on to point out that this concern is evidenced in section 101 of the Act which provides that "the intent of the legislature in enacting this statute is to evaluate the competency of persons engaged in the real estate business for protection of the public." ILL. REV. STAT. ch. 114½, § 101 (1973) (current version at ILL. REV. STAT. ch. 111, § 5701 (1977)). Furthermore, the court looked to the language of the court's opinion in *Ranquist*. See note 76 *supra*.

81. 59 Ill. App. 3d at 1048, 370 N.E.2d at 271-72, citing ILL. REV. STAT. ch. 114½, § 115(b) (1973) (current version at ILL. REV. STAT. ch. 111, § 5732(b) (1977)), which provides:

The Department may refuse to issue or renew, may suspend or may revoke any certificate of registration for any one or any combination of the following courses: . . . (b) where the registrant has been convicted of any crime, an essential element of which is dishonesty or fraud or larceny, embezzlement, obtaining money, property or credit by false pretenses or by means of a confidence game, has been convicted in this or another state of a crime which is a felony under the law of this State or has been convicted of a felony in a federal court.

82. *Coles v. Dep't of Registration and Educ.*, 59 Ill. App. 3d 1046, 1049, 376 N.E.2d 269, 272 (1st Dist. 1978). Furthermore, the statute did not require that the Department make an express finding that the continuation of plaintiff as a real estate salesman would be contrary to the public interest. *Id.* Plaintiff had tried to invoke a section of the Unified Code of Corrections, concerning restoration of license rights suspended because of criminal conviction. *Id.* at 1049, 376 N.E.2d at 272. In order to justify the refusal to restore a license at the expiration of imprisonment or upon petition of a person not imprisoned, that statute did require a finding that the restoration would not be in the public interest. However, this case involved the initial revocation of a license because of a conviction, not the restoration of the license; therefore, that statute was inapplicable. *Id.*

83. *Id.* at 1050, 376 N.E.2d at 273. The court stated: "ILL. REV. STAT. 1973, ch. 114½, par. 115(b) (current version at ILL. REV. STAT. ch. 111, § 5732(b) (1977)), does not require that the felony be so related to the licensed profession. . . ." *Id.*

84. *Id.*

suspension was affirmed. This case illustrates the Illinois courts' concern for protecting the public from unscrupulous persons acting as real estate agents. Other protection is afforded by the Real Estate Recovery Fund.<sup>85</sup>

#### THE REAL ESTATE RECOVERY FUND

The Real Estate Recovery Fund was designed as a remedy of last resort for persons who have suffered monetary damage at the hands of a real estate agent. The Act not only prohibits offensive conduct by brokers, but requires that the industry contribute, through a portion of licensing fees, to a fund which is intended to insure that the public is compensated for the unlawful acts of persons in the industry. As will be seen, however, this portion of the Act, unlike the portions dealing with broker's conduct, is not liberally construed.

In two recent cases the Illinois Appellate Courts considered the procedures necessary for recovery from the Fund. In *Buonincontro v. Kloppenborg*,<sup>86</sup> the Illinois Department of Registration and Education, as Trustee of the Real Estate Recovery Fund, appealed from an order allowing plaintiffs' claim for payment from the Fund.

Plaintiffs' initial suit was against certain real estate agents who allegedly made misrepresentations which induced the plaintiffs to enter a sales contract which they later rescinded. When the contract was rescinded, however, the real estate agents refused to return the plaintiffs' earnest money deposit. A default judgment was entered against the real estate agents in the amount of the money deposited plus attorney's fees and costs. Subsequently, the plaintiffs voluntarily vacated the judgment against one of the agents, apparently to protect that agent from the loss of her license.<sup>87</sup>

In their complaint for recovery from the Fund, the plaintiffs alleged that they had attempted to recover from the agents but had been informed that one of the agents had filed for bankruptcy. The attorney for the trustee in bankruptcy had informed them that since they were general unsecured creditors it was unlikely they could recover from the real estate agents.<sup>88</sup>

The Department defended on the grounds that the plaintiffs had failed to pursue diligently their remedies against the real estate agents, as required by the License Act.<sup>89</sup> By voluntarily dropping the one agent from the suit and by failing to challenge the bankruptcy petition of the other agent on the basis of fraud, the Department argued that the plaintiffs waived their right to proceed against the Recovery Fund.<sup>90</sup> The plaintiffs countered that they had notified the Department at the time of their original action against the

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85. ILL. REV. STAT. ch. 111, §§ 5716-5725 (1977).

86. 61 Ill. App. 3d 1041, 378 N.E.2d 635 (2d Dist. 1978).

87. *Id.* at 1042, 378 N.E.2d at 636.

88. *Id.*

89. *Id.*

90. *Id.*

agents but at that time the Department chose not to intervene.<sup>91</sup> Following a summary hearing by the trial court, the Department was ordered to make payment to the plaintiffs out of the Recovery Fund.<sup>92</sup> The Department appealed.

On appeal the court emphasized certain sections of the Real Estate Recovery Act which require that the aggrieved individual make "all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets"<sup>93</sup> and then diligently pursue his remedies against all persons liable to him.<sup>94</sup> The Department argued and the court agreed that the statutory sections dealing with the Recovery Fund represent a substantial departure from the common law and are not regulatory provisions. Thus, these sections of the Real Estate Brokers and Salesmen License Act must be strictly construed<sup>95</sup> in contrast to the provisions governing the conduct of realtors.<sup>96</sup>

The court then found that the plaintiffs had not diligently pursued their remedies against the defendant-realtors because by vacating the judgment as to the one agent the right of subrogation, given the Department by section 8.7 of the statute,<sup>97</sup> was destroyed. Furthermore, the plaintiffs should have pursued their claim against the trustee in bankruptcy rather than relying on the opinion of its attorney. The Recovery Fund was designed by the legislature to serve as a "remedy of last resort."<sup>98</sup>

However, the court was careful to point out that its holding was not to be construed as mandating that one who seeks payment from the Real Estate Recovery Fund must present formal proof that every possible avenue of recovery from other sources was absolutely precluded.<sup>99</sup> Rather, the statute required only "reasonable searches and inquiries."<sup>100</sup> Thus, the court would not accept the Department's contention that the petitioners, in order to recover from the Fund, must challenge the bankruptcy adjudication for fraud. Such extreme diligence on the part of petitioners "would appear to be

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91. *Id.*

92. *Id.*

93. ILL. REV. STAT. ch. 111, § 5718(b)(4) (1977).

94. *Id.* at § 5718(b)(6).

95. *Buonincontro v. Kloppenborg*, 61 Ill. App. 3d 1041, 1043, 378 N.E.2d 635, 637 (2d Dist. 1978).

96. *See Ranquist v. Stackler*, 55 Ill. App. 3d 545, 551, 370 N.E.2d 1198, 1203. *See also* note 76 *supra*.

97. ILL. REV. STAT. ch. 111, § 5722 (1977).

98. *Buonincontro v. Kloppenborg*, 61 Ill. App. 3d 1041, 1043, 378 N.E.2d 635, 637 (2d Dist. 1978). However, the case was remanded to the trial court for further hearing, for if it could be shown that the release of the Department's subrogation rights against the released agent would have yielded the Department no recovery, and if it could be shown that no money could be recovered from defendants to the original action, even upon diligent pursuit, then the plaintiffs could recover from the fund. Of course, any recovery from the realtors would offset any amount available under the Recovery Fund. *Id.*

99. *Id.* at 1043, 378 N.E.2d at 637.

100. *Id.*

completely unrealistic"<sup>101</sup> since property obtained by fraud must be identified and traced in order to remove it from the assets of bankruptcy.

Another case, *Jones v. Anderson*,<sup>102</sup> dealt with the type of hearing necessary under the Real Estate Recovery Act. In *Jones*, the circuit court had ordered the Illinois Department of Registration and Education to pay plaintiffs \$10,000 out of a total loss of nearly \$15,000. They had sustained this loss because of the fraudulent conversion of an earnest money deposit by a licensed real estate broker. At the time the plaintiffs originally filed suit against the real estate broker for fraudulent conversion, they sent a copy of the complaint to the Department of Registration and Education. After a default judgment against the broker and after the hearing on the matter of compensatory and punitive damages, the plaintiffs caused a Citation to Discover Assets to be issued so that they could proceed to collect the awarded judgment. After the search for the broker proved unsuccessful, the plaintiffs petitioned for recovery from the Illinois Real Estate Recovery Fund.

The Department defended against payment from the Fund, arguing that the petition failed to allege that the fraud or deceit occurred on or after January 1, 1974, the effective date of the statute. The petitioners' monies had been deposited with the broker prior to that date. The Department also contended that its receipt of a letter and copy of complaint from the petitioners did not establish notification that a complaint had been filed as required by the statute.<sup>103</sup> The trial court disagreed.

The court found that no testimony or evidentiary hearing was required to establish the plaintiff's allegations.<sup>104</sup> The issue on appeal was the Department's contention that the Real Estate Recovery Fund Act requires a fair hearing prior to any judgment concerning recovery. The Department felt that its answer to the petitioners' complaint raised substantial issues of fact which could not be resolved on the pleadings and therefore the lower court should not have proceeded in a summary fashion.

Although the appellate court could have answered this argument by pointing to the statutory language directing the court to "proceed upon the application in a summary manner"<sup>105</sup> it chose to explain what type of hearing the Act required. The court stated that proof of compliance with the Fund's prerequisites to recovery could be made by examination of the pleadings, affidavits, and other matters of record.<sup>106</sup> In a case seeking recovery from the fund, the merits of the dispute between the aggrieved party and the defendant have already been determined in court and a further hearing on the merits would be unnecessary. Upon the entire record, the trial court

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101. *Id.* at 1044, 378 N.E.2d at 637.

102. 62 Ill. App. 3d 284, 379 N.E.2d 104 (1st Dist. 1978).

103. *Id.* at 287, 379 N.E.2d at 105.

104. *Id.* at 287, 379 N.E.2d at 106.

105. *Id.*, citing ILL. REV. STAT. ch. 114½, § 108(3)(b) (1975) (current version at ILL. REV. STAT. ch. 111, § 5718(c) (1977)).

106. *Id.* at 288, 379 N.E.2d at 106 [citations omitted].

had found that there was no material issue in controversy. Therefore, the appellate court affirmed the judgment for plaintiffs.

#### THE BROKER'S RIGHT TO A COMMISSION

The broker will use a "standard form contract" to obligate buyer and seller to produce a commission. Disputes concerning liability for the broker's commission have led to a great deal of litigation. A number of cases dealing with a broker's right to a commission were decided recently.

In *Kenilworth Realty Co. v. Sandquist*,<sup>107</sup> the defendant appealed from a jury determination that the plaintiff-broker had procured a prospective purchaser and, according to the terms of the exclusive listing agreement, was entitled to a commission.<sup>108</sup> The prospective purchasers procured by the broker offered the defendant's asking price contingent upon the purchasers' obtaining a 75% loan within 20 days. The purchasers had already received an oral commitment for the loan. The defendant rejected this offer on the basis of the mortgage contingency, claiming that the contingency was not in conformity with the listing agreement. Later, the defendant told the prospective purchasers that he was reluctant to sell the property because of the tax consequences.<sup>109</sup> When the purchasers realized that acceptance would require a full cash offer with no contingency clause, they proceeded to get a final commitment from their lenders so they could give the owner the offer he wanted. The lender could not give such a commitment without an appraisal of the property and the owner was uncooperative in allowing the appraisal to be made.<sup>110</sup>

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107. 56 Ill. App. 3d 78, 371 N.E.2d 936 (1st Dist. 1977).

108. *Id.* at 78-79, 371 N.E.2d at 937. Under the executed listing agreement, the broker was to receive a commission:

If a contract to purchase and sell the property is executed by seller and purchaser through the services and efforts of realtor, seller or by or through any other persons during the period of this agreement or if such contract to purchase and sell is executed within six months after termination of this agreement with a purchaser to whom it was offered during the period hereof.

*Id.* at 80, 371 N.E.2d at 937.

109. *Id.* at 80-81, 371 N.E.2d at 937-38. At a still later date, but well within the six month period of the listing, the persistent purchasers told the defendant that they could be prepared to close the transaction if the defendant could provide good title. At the time of this interchange, several ideas were entertained concerning the conceivable tax benefits the defendant could achieve by various approaches to the transaction.

110. When the defendant was elusive about allowing access to the building for purposes of the appraisal, the broker secured entry by paying the janitor five dollars. There was conflicting testimony as to the facts surrounding the realtor's entry. She testified that she appeared at the building at the time and on the date appointed by the defendant. The defendant testified that he had made no such appointment and had told her that he would not be available until Monday, the following business day. The realtor claimed that the five dollars was given to show "gratitude" for the janitor's kindness. *Id.* at 83, 371 N.E.2d at 939.

Shortly thereafter, the defendant attempted to terminate the listing agreement, charging that the realtor had breached specific agreements.<sup>111</sup> Nonetheless, the defendant continued negotiations with the prospective purchaser with a focus on tax advantages of the sale. When the broker presented the defendant with a full cash offer from the prospective purchasers, the defendant refused the offer explaining that the listing agreement had been terminated.<sup>112</sup>

The court stated the issue to be whether the owner had made a timely revocation of the agency so as to avoid liability for the commission,<sup>113</sup> noting that the principal may not revoke an agency prior to its expiration date unless the broker is guilty of misconduct.<sup>114</sup> The court refused to upset the jury's finding of fact that the defendant terminated the listing agreement without legal justification.<sup>115</sup> Thus, the listing agreement was effective at the time the purchasers made their offer to purchase and the issue became whether the purchasers offer was within the terms of the listing agreement. The crucial question was whether the defendant's rejection of the prospective purchaser's offer for the full listing price could avoid the duty to pay the broker's commission. The defendant argued that because of the mortgage contingency clause the offer was not within the terms contemplated by the listing agreement and therefore the purchasers did not demonstrate financial readiness.<sup>116</sup>

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111. The defendant charged that the realtor had "breached specific agreements by showing the property to prospective purchasers without informing him prior thereto, by attempting to bribe his janitor, and by refusing to furnish all bona fide offers." *Id.* at 81, 371 N.E.2d at 938. The broker defended his failure to present an offer from a prospective purchaser because his offer was one not contemplated by the listing agreement, in that the offer encompassed an exchange of properties and the payment of the purchase price over a five year period, and because the offeror withdrew the offer. *Id.*

112. *Id.* at 82, 371 N.E.2d at 939.

113. *Id.*

114. *Id.* at 82-83, 371 N.E.2d at 939, *quoting* *Nicholson v. Alderson*, 347 Ill. App. 496, 107 N.E.2d 39, 44 (2d Dist. 1952).

115. *Id.* at 83, 371 N.E.2d at 940. But even if the defendant had rightfully terminated the agency, the broker could have sought recovery in quantum meruit. *See Andros v. Hansen Realty Co., Inc.*, 44 Ill. App. 3d 635, 638-39, 358 N.E.2d 664, 667 (2d Dist. 1976); *Nicholson v. Alderson*, 347 Ill. App. 496, 507-08, 107 N.E.2d 39, 42-44 (2d Dist. 1952); *Pretzel v. Anderson*, 162 Ill. App. 538 (1908). While the broker normally earns the commission according to the terms of the listing agreement, the broker may be entitled to quasi-contractual relief if the owner tries to take advantage of the broker's services and then, by relying on technical interpretation of the contract, tries to deprive the broker of the commission. *See Bau v. Sobut*, 50 Ill. App. 3d 732, 365 N.E.2d 724 (1st Dist. 1977); *Western Pride Builders, Inc. v. Zicha*, 23 Ill. App. 3d 770, 320 N.E.2d 181 (1st Dist. 1974).

116. *Kenilworth Realty Co. v. Sandquist*, 56 Ill. App. 3d 78, 84-85, 371 N.E.2d 936, 940-41 (1st Dist. 1977). Of course, the case would have been easily resolved had the owner accepted the offer with the mortgage contingency clause. Where an owner signs an offer that rests on terms different from those contained in the listing agreement, this acceptance evidences an agreement to be bound by the new terms and thus entitles the broker to a commission. *Haas v. Cohen*, 10 Ill. App. 3d 896, 295 N.E.2d 28 (3d Dist. 1973).

The listing agreement was silent as to financing or mortgage contingencies. Citing well established cases, the appellate court held that the mortgage contingency clause did not invalidate the offer or render the prospective purchasers financially disqualified as ready, willing and able.<sup>117</sup> Since the defendant rejected the offer, the question of the purchaser's financial ability was for the jury.<sup>118</sup> The jury found that the broker had performed his obligations under the contract and this finding was affirmed.<sup>119</sup>

Naturally, if a contract containing a mortgage contingency clause is accepted by the seller and the buyers are subsequently unable to obtain the mortgage, the broker will not be entitled to the commission. The listing contract contemplates that the broker procure a ready, willing and able buyer.<sup>120</sup> When the hopeful buyer is unable to buy, the broker has not fulfilled his obligation.

Mortgage contingency clauses are contained in many standard form contracts of purchase and the court judicially noticed this fact.<sup>121</sup> At the same time, it is not uncommon for a listing agreement to be silent as to financing arrangements. The consistency required between the listing contract and the contract of purchase has not been made entirely clear by any Illinois court decision. If the purchase contract conforms with the terms of the listing agreement the owner who refuses to accept an offer will be liable for a broker's commission.<sup>122</sup> An owner will also be liable for a broker's commission if he refuses an offer containing a mortgage contingency where the offeror demonstrates that the mortgage will be obtained at some future date.<sup>123</sup> Although thorough guidance is needed on the subject of variance

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117. The appellate court stated that a broker who produces a prospective purchaser who is continuously willing to purchase during the time of the relevant negotiations and who is able to execute a contract upon the agreed terms at a reasonable time, has made a prima facie case for recovery of his commission. *Kenilworth Realty Co. v. Sandquist*, 56 Ill. App. 3d 78, 84, 371 N.E.2d 936, 940-41 (1st Dist. 1977).

118. *Id.* at 85, 371 N.E.2d at 941.

119. *Id.* at 85-86, 371 N.E.2d at 941.

120. *Id.*, citing *Katz v. Brooks*, 65 Ill. App. 2d 155, 212 N.E.2d 508 (1st Dist. 1965); *Cooper v. Liberty Nat'l Bank of Chicago*, 332 Ill. App. 459, 75 N.E.2d 769 (1st Dist. 1947).

121. *Kenilworth Realty Co. v. Sandquist*, 56 Ill. App. 3d 78, 86, 371 N.E.2d 936, 941 (1st Dist. 1977).

122. In 1930, an Illinois Appellate court would have had this question decided by the terms generally in use in the community. In *Spengler v. Eiger*, 255 Ill. App. 322 (1st Dist. 1930), the variance between the listing and the contract of purchase did not defeat the broker's claim to a commission, because the non-conforming terms were generally in use in the community. *Kenilworth Realty Co. v. Sandquist*, 56 Ill. App. 3d 78, 86, 371 N.E.2d 936, 942 (1st Dist. 1977). But the majority in *Sandquist* refused to give such conclusive status to custom. Loan officers from two lending institutions testified that they had given oral loan commitments to the purchaser, but in accordance with their business practice, the commitment was contingent upon an appraisal and a signed contract. *Id.* Whether the court meant to depart from the earlier case is unclear: in *Sandquist*, the evidence of financial ability of the prospective purchasers was sufficient to sustain a finding that the broker had performed his obligations.

123. The dissent of Justice Simon gives ample consideration to the issue of non-conforming terms in general and mortgage contingency clauses in particular. Simon characterized mortgage contingency as "only a proposal without consideration for an option to purchase." *Id.* at 87, 371



between the listing and the contract of purchase, some of the difficulty could be obviated by the real estate bar. If a lawyer is consulted before the listing is signed, the listing can be made sufficiently precise to satisfy the owner.

### *The Homestead Case*

The foregoing cases illustrate the need to recognize the unique role of the broker, the nature of which is often adverse to the broker's own principal, and sometimes, to the public at large. The role of the attorney, however, is to specifically protect the interests of his client. This protection is often directly at odds with the interest of the broker and is one reason for broker-lawyer discord. Another important cause of the professional animosity between brokers and lawyers is the apparent attempt of the broker to eliminate the role of the lawyer.<sup>124</sup> This occurs initially by the broker's repre-

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N.E.2d at 942. Simon found the contingency particularly wanting for not including the customary details, such as interest rate and amortization period. However, even with those details, the offer would still fall short of the requirements of the listing, since it would not have given the seller a basis for determining the likelihood of the buyers' obtaining the financing. Thus, the seller would not be able to determine whether to tie up his property on the offered contingency. *Id.* at 88, 371 N.E.2d at 942. Justice Simon recognized the practical significance of the mortgage contingency clause: the buyer, if unsuccessful in obtaining financing, is entitled to the return of his earnest money deposit. The seller, then, ties up his property for the duration of the buyer's search for financing, and, in the end, has nothing to show for it. Simon restated the well-known rule of *Sharkey v. Snow*, 13 Ill. App. 3d 448, 300 N.E.2d 279 (3d Dist. 1973): "A broker who produces a buyer offering to purchase on terms which vary from those contemplated by the listing agreement is not entitled to a commission unless the seller accepts the terms offered." *Id.* at 452, 300 N.E.2d at 282.

The dissenting Judge amplified his understanding of "financially ready," which is, of course, a requirement on the part of the prospective purchaser in order for the broker to earn the commission. *Kenilworth Realty Co. v. Sandquist*, 56 Ill. App. 3d 78, 89, 371 N.E.2d 936, 944 (1st Dist. 1977). Financial ability requires command of the funds within the time allowed by the offer: "command" cannot be satisfied by dependence on a third party that has not obligated itself to provide those funds. Simon would have found the evidence on this issue to indicate that the lenders, who had made oral commitments to the prospective purchaser, were not bound by their oral commitments, *id.* at 90-91, 371 N.E.2d at 944-45 (Simon, J., dissenting), in spite of the testimony that it was the usual business practice of these lenders to make oral commitments only, until such time as they were able to inspect the executed contract and to appraise the property. Judge Simon went further and insisted that, in order for the purchaser to show the necessary command of the funds, the offer should not contain a mortgage contingency. In this way, the prospective purchaser can eliminate the obstacle to a binding written commitment from the lender, because then, presumably, the owner will accept the offer and the lender can then proceed with the written commitment.

This reasoning would obligate a buyer to purchase property before the buyer had any assurance that financing would be available. This solution is entirely unrealistic in the residential market, where it is common for the buyer to purchase a home in large part through a home mortgage loan. The real estate brokerage industry would strongly oppose such a rule, because any owner could refuse to accept an offer containing a mortgage contingency.

But Simon was not so hard on the brokers: he would have reversed and remanded the case so that the broker could recover "on a quantum meruit basis for its expenses and the value of its service." *Id.* at 92, 371 N.E.2d at 946.

124. Since the *Quinlan & Tyson* case held that the broker in Illinois can complete the standard form contract of purchase and sale between the buyer and seller, an attorney may be a dispensable party to both the buyer and seller in a purchasing agreement. See note 27 and

sentations that standard form contracts sufficiently serve the interests of all parties.<sup>125</sup> The broker may then tell the buyer to rely on a lending institution and title insurance rather than an attorney.<sup>126</sup> While these statements by the broker are contrary to the letter and spirit of the Accord, they rarely result in the imposition of any sanctions.

Several bar associations were responsible for a final judgment order in a circuit court case that significantly limited the activities of real estate brokers where those activities impinge on the practice of law. In *South Suburban Bar Association Inc. v. Homestead Realty Inc.*<sup>127</sup> the South Suburban Bar charged Homestead Realty and two of its employees with the unauthorized practice of law.<sup>128</sup> Homestead Realty had used form contracts provided by Chicago Title Insurance Company and Pioneer National Insurance Company. Where these form contracts contained large spaces, the realty office considered those spaces as blanks to be completed per the *Quinlan & Tyson* decision.<sup>129</sup> In preparing for the closings of the transactions, the realty office assisted in the execution of title clearance documents. When neither party to the transaction had an attorney, the defendant would close the deal. Homestead Realty also prepared closing statements detailing the disbursement of monies at the closing. In granting injunctive relief for the protection of the public, the court ordered the defendant to refrain from advising parties that they do not need a lawyer and to refer parties who have no lawyer to the referral services of the recognized bar associations. The court ordered the defendant to refrain from treating large spaces in contracts as blanks to be completed by realtors. The only blank-filling now allowed is the insertion of "factual data in spaces provided therefor between two words. . . ." <sup>130</sup>

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accompanying text *supra*. However, the broker in Illinois is not permitted to give legal advice to the parties, or to draft most legal documents. See notes 27 & 28 and accompanying text *supra*.

At least one attorney has suggested that Illinois go the way of Arizona, which, by constitutional amendment, ARIZ. CONST. art. 26, § 1, allows brokers to close real estate transactions. The reason for the suggestion? Post-closing litigation, brought on by inept broker closings, is much more lucrative than is the closing itself. The source of this suggestion wisely wishes to remain anonymous.

125. Of course, there is no such thing as a universal contract that will serve all parties.

126. Of course, the lending institution is interested in the validity of its lien, and as a consequence of buyer's equity, may not be very interested in encumbrances of a small dollar amount. And the lender is not at all concerned with such details as possession and personality.

127. No. 75-CH-4297 (Cook Co. Cir. Ct., Chancery Div., filed Dec. 9, 1977).

128. The Illinois State Bar Association and the Chicago Bar Association intervened in the action. For a general discussion, See ILLINOIS STUDENT BAR ASSOCIATION, 23 REAL PROPERTY NEWSLETTER 1, 3 (March 1978) [hereinafter cited as NEWSLETTER].

129. Homestead had filled those blanks with details concerning violations of local ordinances, survey requirements, lot grading information, inspection requirements, conditions and maintenance of buildings, lease and rental conditions, lien provisions, and numerous other details as contract addenda. It was found that Homestead Realty had given legal advice as to the significance of those provisions. The defendant also maintained a processing department which assisted in the closing of real estate transactions.

130. The contract forms used by Homestead were those forms printed by Chicago Title Insurance Company and by Pioneer National Title Insurance Company, and distributed free

Defendants were specifically prohibited from preparing closing statements and from transmitting title clearance information to title services, except where done under the supervision or at the request of an attorney for one of the parties. Finally, defendants were not to give any opinions concerning the legal significance of any document.

Although this case is merely a local ruling of the circuit court, there are indications that it is more significant than its status indicates.<sup>131</sup> The final judgment order was approved by the lawyers' professional associations and indirectly by real estate agencies. This means that both professional organizations would be willing to police its terms. Furthermore, this is the first definitive opinion subsequent to *Quinlan & Tyson*.<sup>132</sup> Although this case may serve to ensure that home-buyers and sellers are represented by attorneys, it is but a minimal step toward the recognition of the true interests of the broker.

Rather anomalously, the First District held in *Pacelli v. Kloppenberg*<sup>133</sup> that it is not legal malpractice for an attorney to entrust a licensed real estate broker with securing the release of a prior mortgage. Plaintiffs contracted to buy a piece of real estate and they hired the defendant to represent them in the transaction. The property was encumbered by a mortgage which, as is customary, was to be paid off and released from the proceeds of the sale. The plaintiff's real estate broker offered to deposit the amount needed to discharge the mortgage. The broker converted the funds to his own use and failed to release the mortgage. The plaintiffs argued that it was the responsibility of their attorney to insure that the plaintiffs received title free of all encumbrances. In order to do so, the attorney should have investigated the broker before allowing his client to deposit the funds which were to release the mortgage. The court agreed instead with the defendant's contentions that the attorney had no duty to prevent his clients from using a licensed real estate broker as an escrowee for the release of the prior mortgage. Requiring the attorney to obtain the release of the mortgage personally would place an undue burden on the attorney since the broker's conversion of the plaintiff's funds to his own use was unforeseeable.<sup>134</sup>

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throughout the Chicago area to attorneys and brokers. By sanctioning their use, the court, in effect, was limiting the broker's insertions on the contract to data such as the closing price, sales price, possession date, etc. Contingencies, warranties, and any other type of prose which may be deemed the "completion of blanks" will no longer be allowed.

131. NEWSLETTER, *supra* note 128, at 3. See also Jones, *Homestead Clarifies Quinlan-Tyson Decision and Sets Precedent for Future*, 66 ILL. B.J. 512 (1978).

132. In effect, this decision was the court's and the intervening parties' first clear interpretation of *Quinlan & Tyson* and the Accord. See generally Jones, *Homestead Clarifies Quinlan-Tyson Decision and Sets Precedent for Future*, 66 ILL. B.J. 512 (1978).

There is litigation pending on the question of whether agency closings constitute the unauthorized practice of law by title companies. See *Kane and DuPage Bar Associations v. Chicago Title Ins. Co.* (78 C 4547).

133. 65 Ill. App. 3d 150, 382 N.E.2d 570 (1978).

134. *Id.* at 151, 382 N.E.2d at 571.

To support this conclusion, the court correctly noted that the broker was the agent of the plaintiff and as such owed plaintiffs the duties of a fiduciary.<sup>135</sup> Although it is true, as the court suggested, that the fraudulent conversion was unforeseeable and that the attorney has no duty to protect against the criminal conduct of third parties,<sup>136</sup> the attorney here allowed the broker to perform the essentially legal function of insuring that the client got clear title. Yet this was not even considered a breach of his duty to his client.

#### CONCLUSION

Since the Illinois Supreme Court's decision in *Quinlan & Tyson*, Illinois courts have continued to struggle with issues concerning guidelines for the conduct and duties of real estate brokers. In dealing with the obligations between a broker and his or her client within the context of a fiduciary relationship, courts have recognized that brokers often have interests which are adverse to the interests of their employers. Moreover, Illinois courts have been involved in protecting the public interest in accordance with the Real Estate Brokers and Salesmen License Act and making decisions as to the procedure for recovery from the Real Estate Recovery Fund. Other significant litigation has focused on the broker's right to a commission and under what circumstances the client is no longer obligated to pay the commission.

Finally, courts in Illinois have recently begun to deal with the specific roles of both the broker and the attorney and the questions concerning when it is appropriate for the broker to perform certain legal functions. At least one court has decided that when a broker does perform a legal function, the attorney has no duty to protect his or her client from possible misconduct. Because specific role delineations are still not clear, Illinois courts will undoubtedly continue to be troubled with these problems.

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135. See notes 29-61 and accompanying text *supra* for discussion of the broker-client relationship.

136. 65 Ill. App. 3d 150, 150-151, 382 N.E.2d 570, 571 (1978).

